MOTION FOR LEAVE TO FILE A MEMORANDUM AS AMICUS CURIAE

Pursuant to Rule 42(1) of the Rules of this Court, the Building and Construction Trades Department, AFL-CIO, (hereinafter, "Department") moves for leave to file a memorandum as *amicus curiae*. The filing of this motion is occasioned by certain statements, which we deem inaccurate, in the motions and briefs, *amici curiae,* previously filed in this Court by the Laborers' International Union of North America, AFL-CIO (hereinafter, "Laborers") and by the Associated General Contractors of America (hereinafter, "AGC") together with four other employer associations. They involve the position of the building trades unions as to the legal issue decided by the court below, the nature of the prior and current "Plan for Settling Jurisdictional Disputes Nationally and Locally" (hereinafter, "Plan") to which the Department has been the union signatory, and the stabilizing effect on labor relations in the building and construction industry which will result from the decision by the court below. For this reason, consideration of this motion is requested only in the event that this Court grants one or both of the aforementioned motions of *amici.*

INTEREST OF THE AMICUS

The Department, which was established in 1908, is composed of the seventeen international union affiliates of the AFL-CIO which represent employees in the building and construction industry, including the Plasterers and the Bricklayers International Unions, whose affiliated local unions were parties to this case in the court below, and the Laborers. The Department's affiliates represent more than three million employees in the industry. Among the Department's "objects and principles," as stated in Article II of its Constitution, are the following:

(6) To secure the adjustment of trade and jurisdic-

> tional disputes in the building and construction trades industry along practical lines as they may arise from time to time; and such decisions to be final and binding on all affiliated National and International Unions and their affiliated Local Unions.
>
> • • •
>
> (8) To promote industrial peace and develop a more harmonious feeling between employers and employees.
>
> • • •
>
> (10) . . . to protect and advance the interests of the building and construction trades industry.
>
> • • •
>
> (11) To engage in . . . legal . . . activities appropriate for the advancement of the interests of affiliated unions and their members in the building and construction trades industry.

In November 1968 a resolution was adopted by the Executive Council of the Department and was unanimously approved by the Convention of the Department in September 1969 authorizing the filing of a brief *amicus curiae* in this case. *Report of Proceedings of the Fifty-Fifth Convention of the Building and Construction Trades Department, AFL-CIO (1969)*, pp. 92, 296-300. Accordingly, the Department moved in the court below for leave to file a brief, *amicus curiae*. The motion was granted and the Department's brief is referred to in the opinion of the court (Appendix to NLRB Petition, (hereinafter, "A"), p. 31 n. 10). While the motion by Laborers in this Court (p. ii n. 1) refers to that brief, it does not indicate the position asserted therein: the Department's brief supported the interpretation of Section 10(k) adopted by the court below and did so in the belief that such an interpretation would strengthen the structure of the Plan and thus help to stabilize labor relations in the building and construction industry.

The instant motion and memorandum are being filed pursuant to the same authorization and with the same interest which governed the Department's participation in the court below.

CONCLUSION

For the foregoing reasons, the Department would respectfully move for permission to file a memorandum, as *amicus curiae,* in the event similar permission is granted for the filing of other, previously submitted briefs *amici curiae.*

Respectfully submitted,

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February 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PLASTERERS' LOCAL UNION No. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, et al.

No. 1231

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC., *Petitioners*

v.

PLASTERERS' LOCAL UNION No. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, et al.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM AS AMICUS CURIAE ON BEHALF OF BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO

An accurate picture of the current Plan, which, effective April 3, 1970, continued the National Joint Board for the Settlement of Jurisdictional Disputes in the building and construction industry, has not been presented by the *amici* papers of Laborers or of AGC and other associations (hereinafter "associations"). In contrast to their one-sided characterization of the twenty-three year old National Joint Board is the statement of then-Secretary of Labor Shultz:

> Significantly, the agreement broadens Board representation by various segments of the industry, provides procedures for handling the most serious and recurring disputes and specifically considers consumer inter-

ests along with the interests of workers and employers.[1]

Contrary to the statement in Laborers' motion (pp. iv-v), general contractors continue as parties to the current Plan and the Joint Board itself continues to include representa-

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[1] The full "Statement by Secretary Shultz," which was released by the U. S. Department of Labor (USDL 11-150) on April 7, 1970, following the Secretary's witnessing of the signing of the current Plan, was as follows:

> In establishing the Construction Industry Collective Bargaining Commission last year, President Nixon expressed this Administration's deep commitment to the institution of free collective bargaining.
>
> For this institution "to survive and prosper" he said, "the parties must assume the full share of their responsibility to the industry and to the Nation".
>
> Today, I am gratified to participate in an occasion that symbolizes this assumption of private responsibility by labor and management in the Nation's vital building and construction industry.
>
> The Building and Construction Trades Department, AFL-CIO, and the participating contractors employers' associations have signed an important agreement that provides more effective procedures for settling jurisdictional disputes locally and nationally.
>
> By not only continuing but revitalizing the 22-year-old National Joint Board, the parties have strengthened the construction industry's machinery for dealing with these troublesome and costly disputes.
>
> Significantly, the agreement broadens Board representation by various segments of the industry, provides procedures for handling the most serious and recurring disputes and specifically considers consumer interests along with the interests of workers and employers.
>
> The National Joint Board—established just after World War II—functions as the building and construction industry's response to the type of private, voluntary solutions to jurisdictional disputes sought by the Congress when it enacted the Taft-Hartley Act.
>
> In January, the Construction Industry Collective Bargaining Commission, with members representing labor, management and the public, endorsed the development of private, dispute-settling procedures by the parties themselves. This agreement dealing with jurisdictional disputes—the product of hard and long negotiations—embodies just that kind of healthy, private action.

tives of the general contracting branch of the industry. There are thirteen organizations which comprise the "Participating Contractors Employers' Associations," the "employer" signatory to the Plan, representing more than 25,000 contractors in the building and construction industry. (These thirteen organizations are listed in an appendix hereto. The seventeen affiliates of the Department are also listed.) Of the thirteen organizations, eight are national associations of mechanical and specialty contractors, and five are employers of the basic trades—carpenters, iron workers, laborers, masons, operating engineers—including the National Constructors Association (NCA) consisting of thirty-three of the largest general contractors in the world (e.g. Bechtel Corp.; Day & Zimmerman, Inc.; Dravo Corp., Engineering Construction Division; Ebasco Services, Inc.; Kaiser Engineers; Koppers Co., Inc., Engineering & Construction Div.; Stone & Webster Engineering Corp.).[2] Indeed, many of the members of the NCA are also members of the Associated General Contractors.[3] The fact that a particular trade association of general contractors—AGC—has chosen to withdraw from participation on the National Joint Board does not mean that the interests of the general contracting branch of the industry cannot be otherwise represented on that Board. The eight employer members (regular and alternate) on the expanded Joint

[2] NCA members hire a large number of Laborers, members of the laborers' Union.

[3] Despite the formal withdrawal of AGC, many others of its members, in addition to NCA members, remain individually stipulated to the Plan. Furthermore, general contractors such as AGC members subcontract a large portion of their contracts to subcontractors who are members of the eight national mechanical and specialty associations which are parties to the current Plan. These facts show that a very large portion of the annual construction volume referred to at page 2 of associations' motion is performed by employers who are stipulated to the current Plan. And, it should be noted that that reference is limited to volume of construction rather than volume of employment. The bulk of organized employees in the industry are employed by the contractors represented by the Participating Contractors Employers' Associations.

Board include four representatives of the general contracting branch of the industry, including two officers of NCA, an official of Ford, Bacon & Davis, which is a member of both NCA and AGC, and an official of Wayne Steel Erectors.[4]

The *amici* papers of Laborers and associations wrongly assert that the decision by the court below will discourage stability in labor relations in the building and construction industry. Similar arguments—including the misplaced factor of AGC withdrawal from the Plan—were made to the court below, *en banc*, in support of the NLRB petition for rehearing, but the petition was denied. In fact, the opposite conclusion is correct: The large measure of stability which already has been brought to the industry by the Plan will be increased under the rule of law enunciated by the court below.

At the outset is the erroneous statement in associations' motion (p. 3) characterizing the NLRB as "the primary body determining jurisdictional disputes." The Department's brief in the court below pointed out that in roughly the same recent 7½ year period the number of job decisions by the Joint Board in the building industry was more than tenfold the number of NLRB 10(k) determinations *in all industries*, and showed further that, unlike NLRB adminis-

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[4] The factual information in the paragraph above has been supplied by the Chairman of the Joint Board and the Secretary of the Participating Contractors Employers' Associations.

With further regard to Laborers' claim that "there is no assurance that the interests of the General Contractor and his laborer-employees will be preserved," it should be noted that one of the "labor" members of the current Joint Board is Maurice Fancher, Fourth Vice President of the Laborers' Union. Pursuant to the Plan (Art. II, Sec. 1), four of the eight "labor" members of the Joint Board are from the basic trades hired by the general contracting branch of the industry. The Laborers' Union is the only affiliate of the Department which has taken the position asserted by it in this case.

tration of Section 10(k),[5] the industry's need for prompt resolution of disputes is being met by the National Joint Board which renders its decisions within a one to two week period following initial referral. The vast preponderance of disputes which are resolved under the Plan and never become the subject of charges before the NLRB is indicative of the significant accomplishments of the Plan not only in the eyes of labor but of management. Contributing to this success is the Plan's prohibition (Art. VI, Sec. 1) against work stoppages pending a decision by the Joint Board.

Even more indicative of the stability being promoted by the Plan are the thousands of dispute-free work assignments which are being made every day on building and construction jobs, following pre-job conferences among affected groups, by reference to the jurisdictional precedents under the Plan. As John T. Dunlop wrote in a letter to participants in the Plan, upon his resignation as chairman of the Joint Board in 1957, "The course of a dispute and almost all job decisions, except those on novel issues, are largely predictable by lines of precedents." 40 LRRM 18, 21. Stipulated and non-stipulated employers, AGC members and non-AGC members, alike, are being guided by and are applying these precedents on a practical basis and are current and quiet beneficiaries of the industrial peace which they afford. K. Strand, *Jurisdictional Disputes in Construction* (1961) (hereinafter, "*Strand*"), which characterized the accomplishments of the Joint Board as "astounding" (p. 99), referred to the fact (p. 101) that "gradually, the decisions and policies of the Joint Board caused the industry to begin to rely more on precedent and compromise and less upon economic power."

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[5] The Department's brief pointed out that in fiscal year 1968 NLRB 10(k) determinations required a total of 172.5 median days from the filing of the charge to the 10(k) determination. For the first six months of fiscal 1969, such NLRB determinations required a total of 185.0 median days.

The "precedents" of the Plan are not limited to, but are more broadly applicable than, decisions confined to particular construction projects. They include national jurisdictional agreements between international unions, whose negotiation, in consultation with the appropriate management groups, is encouraged by the Plan (Plan, pp. 3-4, 7); decisions by the Joint Board in repetitive disputes, after oral hearing, which are applicable on a locality basis (Procedural Rules and Regulations of the National Joint Board, p. 18); and provision for decisions in highly repetitive and widespread disputes by special and jointly-constituted Hearings Panels, following elaborate proceedings, which are applicable nationally (Plan, pp. 8-11) (e.g. the decision of August 24, 1966, by a Hearings Panel including John T. Dunlop, resolving the recurring dispute between Carpenters and Lathers over the installation of ceiling systems, in which AGC participated and which was unsuccessfully challenged in *Lathers v. Dunlop,* Civil Action No. 1221-66 (D. D.C. 1967), *aff'd. per curiam,* 382 F. 2d 176 (D.C. Cir. 1967), *cert. den.* 389 U.S. 971). *Strand* (p. 101) also had occasion to rely on the Dunlop letter illustrating the precedential values of the Plan:

> Dunlop also cited as accomplishments the recognition that: (1) the Joint Board plan allows jurisdiction to be determined in advance of bidding with uniform application among contractors; (2) the plan seeks to regulate competition among unions in the industry by introducing jurisdictional stability; and (3) national jurisdictional agreements among unions are ". . . the very best way to resolve these questions."

The most unstabilizing factor over the past few years in this area of jurisdictional disputes has resulted from utilization of the device of the non-stipulated contractor who, in those cases where it suits him, has taken advantage of the NLRB's interpretation of Section 10(k) to obtain a determination on a particular job contrary to that which has been rendered, or which precedent indicates would be rendered, under the Plan. At times, the contractor may

decide not to stipulate to be bound by the National Joint Board at the instance of a union which wishes to avoid its obligation under Article X of the Constitution of the Department to accept the decisions of the National Joint Board in the building and construction industry as binding. The decision below tends to reduce the unstabilizing effects of this forum shopping practice.

The decision by the court below, by reducing the opportunity to selectively disregard the settlement machinery of the Plan should promote the objective of stabilized labor relations in the building and construction industry.

The briefs of Laborers (pp. 2, 4-7) and associations (p. 11) erroneously imply that the establishment of the Plan, with its joint, labor-management, constituency was a direct response to the enactment of Section 10(k) of the Taft-Hartley Act and reflected an agreement, not challenged until the litigation in this case, with the NLRB's interpretation of that provision. Long before the enactment of Taft-Hartley—during World War I—there was established by the Department the National Board for Jurisdictional Awards which included employers and architects. Other joint forms of machinery succeeded this Board, and even under the Referee System, established in 1936, the Department-selected referees included the then Executive Manager of the Building Trades Employers Association of Cleveland, and the President of the Thompson-Starrett Company. And, with regard to the establishment of the Plan itself, negotiations between the Department and employer groups commenced approximately one and one-half years before enactment of Taft-Hartley. *Strand,* pp. 64-69, 89.

And, while the Department or the Joint Board—which rarely participate in litigation—may previously have chosen not to litigate that aspect of NLRB administration presented to the court below, the 1965 ABA Report of the Special Committee on the Building and Construction Industry—composed of leading attorneys for both labor and management in this industry—stated, "By the term 'parties'

those legislators who discussed the matter indicated that Congress means the disputing unions themselves" (A. 41-42 n. 21). See also *Penello v. Local Union No. 59, Sheet Metal Workers,* 195 F. Supp. 458 (D. Del., 1961), where the issue was raised and the court reached the same conclusion as the court below (A. 42-43).

Contrary to the statements in Laborers' motion (p. ii) and brief (pp. 2, 7-10, 15), the Joint Board's practice of rendering decisions of jurisdictional disputes whether or not the employers making the assignment of disputed work are "bound" to the Plan has been faithful to the provisions of the Plan from its inception in 1948. Thus, the original Plan, to which AGC was one of the signatories, provided (see appendix to Laborers' brief, pp. 5a-6a):

> It shall be the duty of the Joint Board to consider and decide all cases of jurisdictional disputes in the building and construction industry, which are referred to it by any of the International Unions involved in the dispute; *or* an employer directly affected by the dispute on the work in which he is engaged; *or* by a participating organization representing such employer. (Emphasis added.)[6]

The references in the briefs of Laborers (pp. 7-8) and associations (p. 11) to the Plan's provisions regarding the binding to the Plan of stipulated contractors have no bearing on the Joint Board's jurisdiction or on the legal issue decided by the court below. Rather, they simply make it clear that as a matter of contract-arbitration law, a non-

[6] The "Procedural Rules and Regulations" under the Plan have similarly been consistent with Joint Board practice, providing (p. 10), "When the Joint Board has received a protest of work assignment from an International Union *or* a request for a job decision from a contractor, it shall proceed to make a job decision as outlined below;" (emphasis added). The quotation in Laborers' brief (p. 8) of the provision in the regulations specifying those to whom the regulations apply omits the subsequent paragraph of that provision: "(b) All unions affiliated with the Building and Construction Trades Department, AFL-CIO, in the building and construction industry." That provision therefore makes the procedures in the regulations applicable to the unions on an independent basis.

stipulated employer cannot be judicially compelled to abide by Joint Board decisions or the procedural requirements imposed by the Plan. As a matter of history, these provisions were included to allow for representation on the Joint Board of certain associations, such as AGC, which had no power to stipulate their members to the Plan.

It is respectively submitted that consideration of the instant case by this Court, before the legal issues have been litigated in other cases by other courts of appeals, is not required by the unfounded and unsupported claim of the associations that the decision below will unstabilize labor relations in the building and construction industry or the dire warning of the Laborers' Union of local union disaffiliations which "course of action will eventually threaten the very existence of the Building and Construction Trades Department itself" (Laborers' brief, p. 11).

CONCLUSION

For the foregoing reasons, the Department submits that the petitions for a writ of certiorari should be denied.

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APPENDIX

MEMBERS OF THE SIGNATORIES TO THE CURRENT PLAN FOR SETTLING JURISDICTION DISPUTES NATIONALLY AND LOCALLY IN THE BUILDING AND CONSTRUCTION INDUSTRY

I. Participating Contractors Employers' Associations

1. National Constructors Association
2. National Electrical Contractors Association
3. Mechanical Contractors Association of America, Inc.
4. National Association of Reinforcing Steel Contractors
5. National Association of Miscellaneous, Ornamental and Architectural Products Contractors
6. National Erector Association
7. Crane and Rigging Division of Heavy Specialized Carriers Conference
8. Plumbing-Heating-Cooling Contractors Association
9. Painting and Decorating Contractors of America
10. Sheet Metal and Air Conditioning Contractors National Association
11. Insulation Distributor-Contractors National Association
12. Gypsum Drywall Contractors International
13. Glazing Contractors Labor Jurisdiction Committee

II. Building and Construction Trades Department, AFL-CIO

1. International Association of Heat and Frost Insulators and Asbestos Workers

2. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
3. Bricklayers, Masons and Plasterers' International Union of America
4. United Brotherhood of Carpenters and Joiners of America
5. International Brotherhood of Electrical Workers
6. International Union of Elevator Constructors
7. International Union of Operating Engineers
8. Granite Cutters' International Association of America
9. International Association of Bridge, Structural and Ornamental Iron Workers
10. Laborers' International Union of North America
11. Wood, Wire and Metal Lathers' International Union
12. International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile Helpers and Finishers, Marble Setters Helpers, Marble Mosaic and Terrazzo Workers Helpers
13. International Brotherhood of Painters and Allied Trades
14. Operative Plasterers and Cement Masons International Association
15. United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association
16. Sheet Metal Workers International Association
17. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada